# Water Rights and National Forests—Narrowing the Implied Reservation Doctrine: *United States v. New Mexico*

In *United States v. New Mexico*[1] the United States Supreme Court significantly reduced the federal government's ability to use the "implied reservation" doctrine to claim water rights in the western states for use in national forests. According to the implied reservation doctrine, Congress, in reserving portions of the federal domain for specific federal purposes, such as national parks, national forests, Indian reservations and national monuments, authorizes the reservation of "appurtenant water than [*sic*] unappropriated to the extent needed to accomplish the purpose of the reservation."[2] The doctrine is a hybrid form of water law that resulted from the unique position of the United States as owner of vast amounts of land in the western part of the country, combined with the peculiar demands of life in the arid western states.

By narrowly defining the purposes for which national forests have been, or may be established, the Court in *New Mexico* limited the purposes for which water can be appropriated for use in national forests under the implied reservation doctrine. This Case Comment will examine the development of the implied reservation doctrine, critically analyze the basis of the Court's decision in *United States v. New Mexico*, and discuss the possible effects of that decision.

## I. Historical Background

### A. *The Law of Prior Appropriation*

The practical and legal significance of *United States v. New Mexico* can best be understood in its historical context. This history was shaped by the manner in which the western lands were settled and by a novel type of water law that evolved as a result of both that settlement and the arid character of the land. The law of prior appropriation, which was a pronounced break from the earlier common-law system of riparian water rights, developed out of custom and necessity, initially in the realm of mining and later in the cultivation of the arid western land.

#### 1. *A Comparison of Prior Appropriation and Riparian Water Law*

The riparian system of water rights can generally be described as a system in which the owner of riparian land has a right to use the stream in such a way that he does not cause harm either to the natural flow of the

1. 438 U.S. 696 (1978).
2. *Id.* at 700.

river[3] or to beneficial uses of the water by other riparians.[4] The riparian system is premised on the idea that an owner's property rights in land adjacent to a stream include the right to use the water contiguous to it.[5]

Unlike the common-law riparian system, the law of prior appropriation does not vest water rights in accordance with the ownership of land on the banks of a stream or river. Instead, the right to the use of water is dependent on a priority system—the first taker has the right to all the water he can put to beneficial use at the time of the diversion. Under this system, water may be diverted from its natural watercourse and used on lands far removed from the watercourse.

### 2. *The Development of the Law of Prior Appropriation*

The system of prior appropriation was developed during the gold rush when water was diverted from natural watercourses to mines, often some

3. The RESTATEMENT (SECOND) OF TORTS provides:

Under [the natural flow] theory the primary or fundamental right of each riparian proprietor of a watercourse is to have the body of water flow as it was wont to flow in nature, qualified only by the privilege of each to make limited uses of the water.

The legal consequences of this theory are as follows:

(1) An unprivileged use of water that perceptibly depletes the volume of water on a riparian proprietor's land violates that proprietor's right to the natural condition of the water and is actionable by him, even though it interferes with no use that he is making and causes him no tangible harm. . . .

(4) Riparian privileges are limited to use of the water on or in connection with a use of riparian land and consequently are not transferable apart from that land to nonriparians. A grant purporting to make a transfer does not pass privileges as against riparian proprietors; at most it bars the grantor from complaining of his grantee's nonriparian use.

In the early days of the Industrial Revolution when many mills and factories were powered by water, the doctrine served a very utilitarian purpose as it passed the water down from one mill dam to the next. In today's economy it is not utilitarian and prohibits many beneficial uses of water although those uses may be causing no one any harm and although the water would run to waste if not so used.

RESTATEMENT (SECOND) OF TORTS ch. 41, Topic 3, Scope Note, at 210-11 (1979).

4. The RESTATEMENT (SECOND) OF TORTS provides:

Under the reasonable use theory the primary or fundamental right of each riparian proprietor on a watercourse or lake is to be free from unreasonable uses that cause harm to his own reasonable use of the water. Emphasis is placed on a full and beneficial use of the advantages of the stream or lake, and each riparian proprietor has a privilege to make a reasonable use of water for any purpose, provided that his use does not cause harm to the reasonable uses of others. Each riparian must make his use in a manner that will accommodate as many other uses as possible.

The legal consequences of this theory are as follows:

(1) There is, in its strictest application, no primary right in anyone to have the natural integrity of a stream or lake maintained for its own sake. The primary right of a riparian proprietor is to receive protection for his reasonable use of the stream or lake from an unreasonable use by another. . . .

(7) The riparian privileges of use, not being limited to use on or in connection with the use of riparian land, may include reasonable non-riparian uses, and may to that extent be transferred apart from the land to non-riparians.

The major advantage of this theory is that it tends to promote the beneficial use of water resources.

The reasonable use theory has won an almost complete victory in the courts, although a considerable amount of natural flow language can still be found. . . .

*Id.* at 211.

5. "Riparian law is the basic common law of water rights to streams in the eastern, midwestern and southern states." F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 15 (National Water Commission, Legal Study No. 5, 1971) (citation omitted).

distance away. It was first judicially recognized in *Irwin v. Phillips*,[6] in which the California Supreme Court confirmed the validity of the system because it was well suited to the needs of miners and had been tacitly recognized by both the United States Congress and the California legislature as a means of facilitating the development of mineral resources.[7] Because there was no precedent, the court based its opinion upon a simple recognition of current political and social conditions.

As mining became less significant and agriculture more important, settlers began to realize the need for irrigation. Thus, the system of prior appropriation quite naturally was adapted for use on these newly settled lands. As one commentator explained:

> It was a doctrine especially well suited for a pioneering economy based upon the settlement of vacant lands. The first settler to come into a valley chose his land. If irrigation water was needed, he dug a ditch from the stream to his land. Whether his land was located on the stream or not was immaterial since there was no one to object to his use of the water. The second settler to follow him into the valley had to respect the first settler's homestead and take second choice of the land, and he had to respect the first appropriator's right to the water and irrigate his land with what was left.[8]

### 3. *Application of the Law of Prior Appropriation to Public Land*

Problems arose during the settlement of the unsurveyed western region because many early homesteaders had dug irrigation ditches across federally-owned land to their homesteads. As one commentator stated: "[T]he state and territorial laws applied to these people as well as to those confining their activities to patented land. They were residents and citizens, and their conduct on the public domain as well as on the streets of settled towns was of concern to the local government."[9] Thus, the question arose whether an owner of land patented by the United States at a later date could deny an earlier appropriator the right to use a ditch previously dug across the newly-patented land. Additionally, there was a question whether the new owner could claim a riparian right superior to that of the prior appropriator. These questions were resolved in 1866, when Congress passed an act that recognized those vested water rights on public land that were acknowledged under state law and any rights of way incidental to those rights.[10] Congress clarified this statute in 1870[11] by adding a provision that the rights of any new patentees were subject to "any vested and accrued water rights" recognized by the Act of 1866.[12]

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6. 5 Cal. 140 (1855).

7. *Id.* at 146.

8. TRELEASE, *supra* note 5, at 23.

9. *Id.* at 24. A land patent is a "muniment of title issued by a government or state for the conveyance of some portion of the public domain." BLACK'S LAW DICTIONARY 1013 (5th ed. 1979).

10. Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251.

11. Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217.

12. 43 U.S.C. § 661 (1976). This Act was derived from the Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, and the Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217.

Although the Acts of 1866 and 1870 settled the issue of the validity of the appropriative rights recognized by state and territorial courts prior to 1866, they did not clearly resolve the validity of appropriations made after that date.[13] Much of the confusion surrounded state court interpretations of the Desert Land Act of 1877,[14] which was enacted to encourage the reclamation of arid public lands.[15] It allowed diversions sufficient to reclaim a maximum of 640 acres[16] of land, but the right of use depended on "bona fide prior appropriation."[17] The Act also required all nonnavigable, unappropriated waterways on public lands to be "held free for appropriation and use of the public," including mining, irrigation, and manufacturing.[18]

The states were left virtually unguided in the task of interpreting the scope of rights granted federal patentees under the Acts of 1866 and 1870 and the Desert Land Act. As a result of various interpretations of these Acts, three distinct doctrines were promulgated by the state courts.

The California doctrine was based on the theory that the federal government had both sovereignty over and proprietary rights to the western lands before they were made into states.[19] By reason of their sovereignty upon admission to the Union, however, the states could determine the rights that pertained to federal as well as private ownership of property.[20] Under the doctrine, appropriative and riparian rights continued to coexist; a patentee of federal land received whatever rights the federal government had under state law, which, in California, were riparian rights. These riparian rights were subject to those earlier appropriative rights recognized by the Act of 1866, the Desert Land Act of 1877, and any other appropriative right that existed at the time of a patent of federal land granted under any other statute.

A second theory, the Oregon doctrine,[21] recognized those riparian rights actually exercised through beneficial use of the water prior to adoption of the Desert Land Act with a priority as of the date of entry; all rights arising thereafter had to be established in compliance with this statutory system that used the appropriative concept.[22] According to this theory, the Desert Land Act had established a uniform rule of appropriative rights to be applied to all patentees of federal land.

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13. Note, *Federal-State Conflicts Over the Control of Western Waters*, 60 COLUM. L. REV. 967, 971 (1960).

14. Ch. 107, § 1, 19 Stat. 377.

15. *See* California Ore. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

16. The acreage limitation was later decreased to 320 acres. 43 U.S.C. § 212 (1976).

17. *Id.* § 321.

18. *Id.*

19. The doctrine is exemplified by Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886).

20. *Id.* at 337-38, 10 P. at 720-21. At this time California had adopted common-law riparianism.

21. The leading case is Hough v. Porter, 51 Or. 318, 98 P. 1083 (1909).

22. Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U.L. REV. 639, 645.

Finally, the Colorado doctrine[23] was based on the theory that the United States, although sovereign over western waters, had no proprietary rights in them and had accorded full control over water to each state upon its grant of statehood. Thus, as sovereigns, it was the states that determined which system of water rights should prevail. Under this approach, only the law of prior appropriation was recognized, because that system of water law was considered to be the most appropriate one for the arid states adopting the Colorado doctrine.[24]

Thus, judicial exploration of the scope of the Desert Land Act afforded a basis for the conflicting assertions that a "uniform federal rule of appropriative rights for waters on the public domain had been established, and that full authority had been conferred on the states to control the use and disposition of such waters."[25]

In 1935, the United States Supreme Court resolved this conflict of theories in *California Oregon Power Co. v. Beaver Portland Cement Co.*[26] The Court held that the adoption of the law of prior appropriation was a matter for the states and that a homestead patent granted by the United States did not carry with it the common-law rights of riparian ownership. Instead, it said, the measure of private rights is that which was recognized by local rules and customs. The Court interpreted the Desert Land Act of 1877 as effecting a "severance of all waters upon the public domain, not theretofore appropriated, from the land itself."[27] "From that premise," the Court continued, "it follows that a patent issued thereafter for lands in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed."[28] From this language, it was also clear that water could be appropriated on *any* public land in the states listed in the Act, not just arid or desert land.

Thus, the adoption of either the riparian or prior appropriation systems of water law in a given state has depended to a large degree on the history and needs of the particular state.

### 4. *Elements of the Law of Prior Appropriation*

Currently, the law of prior appropriation has several distinct elements that a water user must meet to have a valid appropriation. The basis of the law of prior appropriation is beneficial use, not land ownership as under

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23. The leading case is Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882). New Mexico had adopted the Colorado doctrine in both its Constitution (N.M. CONST. art. 16, §§ 1-3) and statutory law (N.M. STAT. ANN. § 72-1-1(1978)), and also officially abrogated the common-law riparian system in Albuquerque Land & Irrigation Co. v. Gutierrez, 10 N.M. 177, 61 P. 357 (1900), *aff'd*, 188 U.S. 545 (1903).

24. For a more detailed treatment of the three doctrines, *see* Note, *supra* note 13, at 972-75.

25. *Id.* at 971-72 (citations omitted).

26. 295 U.S. 142 (1935).

27. *Id.* at 158.

28. *Id. See also* note 29 and accompanying text *infra*.

the riparian system. A court may find any number of uses to be beneficial, ranging from irrigation to industrial uses, and is free to recognize new ones.[29] Additionally, because prior appropriation is not based on ownership of land adjacent to a stream, the water can be transported away from the watercourse and even used in separate watersheds and states.[30] Under the appropriation system, the amount of water one may use is a fixed quantity, measured by the beneficial purpose for which the water is to be used; sufficient water will be allowed to fulfill the purpose of the appropriation.[31] The law is based solely on priority of use and does not attempt to benefit all users of the watercourse. For these reasons, prior appropriation law is uniquely suited to the arid states, where great quantities of water must be diverted for both irrigation and domestic purposes.

Priority of appropriative rights attaches upon perfection of the appropriation—that is, when the appropriated water is actually put to a beneficial use.[32] Relative priorities between appropriators of the same watercourse, however, are determined by comparison of the dates on which the initial steps toward appropriation occurred.[33] Thus, if an appropriation is perfected with due diligence, its priority "relates back"[34] to the date of the initial diversion, potentially giving rise to rights superior to those created by an appropriation perfected earlier but commenced later.[35]

Finally, because the right to use water does not run with the land, it is transferable.[36] The right is of indefinite duration and lasts as long as the water is being put to beneficial use.[37]

B. *The Implied Reservation Doctrine*

The implied reservation doctrine may be summarized as follows: If, at the time the United States reserves a part of the public domain for a federal purpose that will ultimately require water, the government intends to reserve unappropriated water for that purpose, then sufficient water to fulfill that purpose is reserved for use by the federal government. There are two major effects of the doctrine: (1) when the water is eventually put to use, the right of the United States will be superior to any private rights in the water acquired after the date of the reservation, thus impairing or

29. TRELEASE, *supra* note 5, at 29-30.

30. *Id.* at 29.

31. *Id.* at 30.

32. *Id.* at 33.

33. *Id.* at 32.

34. *Id.*

35. *Id.* at 30-31.

36. *Id.* at 32-33.

37. The creation of a water right in New Mexico under the Colorado Doctrine requires an intent to appropriate, notice of appropriation, compliance with state laws, a diversion of the water from a natural stream and its application, with reasonable diligence and within a reasonable time, to beneficial use. *See* F. TRELEASE, CASES AND MATERIALS ON WATER LAW 11-12 (2d ed. 1974).

destroying the private rights without compensation for the exercise of the reserved right; and (2) the federal use is not subject to state laws regulating the appropriation and use of water. Additionally, application of the doctrine is apparently not restricted to water arising on the reserved land. For example, in *Winters v. United States*[38] and *Arizona v. California*,[39] the Court applied the doctrine although the water originated upstream from the reservation.[40]

### 1. *Early Western Water Law*

Before the evolution of the implied reservation doctrine it was generally believed that, except for the power of the United States over navigable waterways based on the federal power to regulate commerce, water law was exclusively the province of the states.[41] Prior to the enunciation of that doctrine in 1907,[42] the western states were believed to have acquired any proprietary interests that the federal government had had.

Several statutes appeared to grant the states the power to regulate nonnavigable water rights. The first of these was the Act of 1866[43] as amended in 1870.[44] This Act with its amendments recognized the vested appropriative rights of those who had settled the western lands before later riparian owners and federal patentees.[45] Additionally, the Desert Land Act of 1877[46] stated in part:

> [A]ll surplus water over and above such actual appropriation and use, together with the water of all, [*sic*] lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. . . .[47]

This Act was interpreted, in *California Oregon Power Co. v. Beaver Portland Cement Co.*,[48] as severing all unappropriated water on public lands from the land itself. This severance was possible because the government, as owner of the public domain, possessed the power to dispose of the land and water, either together or separately. The Court held that this severing of the land and water rights made it possible for a state to adopt either the law of prior appropriation or the riparian system, because

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38. 207 U.S. 564 (1908). *See* note 68 and accompanying text *infra*.

39. 373 U.S. 546 (1963).

40. TRELEASE, *supra* note 5, at 109.

41. Moses, *The Federal Reserved Rights Doctrine—From 1866 Through* Eagle County, 8 NAT. RESOURCES LAW. 221, 227 (1975).

42. Winters v. United States, 207 U.S. 564 (1908).

43. Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251.

44. Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217.

45. *See also* notes 10-12 and accompanying text *supra*.

46. Desert Land Act of 1877, ch. 107, 19 Stat. 377.

47. *Id.* § 1.

48. 295 U.S. 142 (1935). *See also* notes 14-15 and accompanying text *supra*.

rights to the land did not include common-law riparian rights. Thus, it would seem that the states had sole power over the determination of all nonnavigable water rights. Later case law, however, indicated that the United States did not give up control of unappropriated nonnavigable waters on reserved lands. Instead these waters were said to be free from any appropriation under state law.

2. *The Theoretical Basis of the Implied Reservation Doctrine*

There are several theories that state the basis for the implied reservation doctrine. It has been argued that the doctrine, as foreshadowed in *United States v. Rio Grande Dam and Irrigation Co.*,[49] is based on a "pure and simple statement of the supremacy doctrine."[50] *Rio Grande* dealt with the proposed building of a dam on the Rio Grande River. The irrigation company, which was acting pursuant to state law, claimed that although portions of the Rio Grande were navigable, it was not navigable at or above the place at which the dam was to be built.[51] The United States claimed that the river was navigable at this point and that the construction of the dam would impede the navigability of the river below the dam.[52] In holding that the dam could not be built even though the stream was not navigable at that point, the Court noted that while a state had the power to change from a riparian to an appropriation system, its power to appropriate water was subject to two limitations:

> First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures to preserve the navigability of the navigable water courses of the country even against any state action.[53]

Professor Trelease has argued that this and later cases[54] actually dealing with the reservation doctrine were based on the supremacy clause.[55] Arguably, under the federal government's general powers to administer its lands, the states are prevented from interfering with the exercise of these general powers. Professor Trelease maintains that the reservation doctrine does not depend on

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49. 174 U.S. 690 (1899).

50. TRELEASE, *supra* note 5, at 147k.

51. 174 U.S. at 693.

52. *Id.* at 692.

53. *Id.* at 703.

54. These cases are Winters v. United States, 207 U.S. 564 (1908) and Arizona v. California, 373 U.S. 546 (1963). In both cases the Court actually applied the reservation doctrine.

55. U.S. CONST. art VI, cl. 2.

> theories of federal ownership of water, faulty interpretations of statutes and false history. The results would have been the same if the Acts of 1866 and 1877 had never been enacted, and nothing would change if those acts were repealed today. Reserved water rights stem from the supremacy clause and the need for water to carry out federal functions.[56]

The "faulty interpretations" that Professor Trelease referred to are those that have, in his opinion, evolved due to the belief on the part of many commentators that the property clause[57] is the basis of the implied reservation doctrine. The theory is that the federal government, as owner of the Oregon Territory, the Louisiana Purchase, the Texas Annexation, the Mexican Cession, and the Gadsden Purchase, possesses the power to dispose of both the land and water on those tracts.[58] At one time the United States owned almost all the land, and the water appurtenant to it, in the seventeen western states. But, the argument goes, the states, by the mere admission to statehood, no more acquired title to nonnavigable waters than they acquired title to the public land.[59] Consequently, it follows that the United States is still the owner of that public land and water appurtenant thereto, unless the United States has disposed of it.[60]

In the Acts of 1866 and 1870 the United States recognized the vested rights of those already using the water. Under the Desert Land Act of 1877 as interpreted by the Supreme Court,[61] Congress recognized that the states have the power to choose to use either the riparian or prior appropriation systems of law.[62] The Act also provided, however, that any surplus unappropriated water, and all lakes, rivers, and sources of water supply on public lands were to remain free for public use. The "severance" of waters from the public domain, however, did not mean that federal ownership of the water was "conveyed" to the states. Thus, according to the proprietary theory, the basis of the implied reservation doctrine is the continued ownership of land by the federal government.

Under the proprietary theory, when the United States reserves a part of the public domain for some purpose of its own, it reserves unappropriated waters sufficient to fulfill that purpose. The reserved water so withheld is the property of the United States, and the government can

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56. TRELEASE, *supra* note 5, at 147*l*.

57. U.S. CONST. art. IV, § 3.

58. TRELEASE, *supra* note 5, at 111. The states created out of these tracts are Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. *See* Morreale, *Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423, 431 n.41 (1966) [hereinafter cited as *Federal-State Conflicts*].

59. *See generally Federal-State Conflicts, supra* note 58.

60. *See* notes 10-13 and accompanying text *supra*.

61. California Ore. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

62. Note, however, that use of the Desert Land Act of 1877 as a basis for the implied reservation doctrine may limit the doctrine to those states to which the Act specifically applies. These states are: California, Colorado, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, North Dakota, and South Dakota. 43 U.S.C. § 323 (1976).

put it to use without compliance with state law. An appropriator complying with state law cannot obtain title to water so reserved, and his right applies only to the surplus water, if any, remaining after the federal right is satisfied. The amount of water that will ultimately be needed on the reserved lands may be used in the meantime by an appropriator who complies with the state law; but if the water is later put to use by the government, it takes no property from the temporary user and owes him no compensation.[63]

The starting point for the development of the doctrine under the proprietary theory, like that of the supremacy theory, is the case of *United States v. Rio Grande Dam and Irrigation Co.*[64] The Court's language in that case, characterizing the United States as "owner of lands bordering on [the] stream,"[65] has been read by at least one commentator as giving "aid and comfort" to the federal government's claim based on a proprietary right.[66] This language is said to refute arguments based on the 1866 and 1877 Acts that the states have exclusive control over their water resources.[67]

The difficulty in reaching a conclusion concerning the theoretical basis of the doctrine is due to the limited number of cases in which the doctrine has been applied. Regardless of the controversy surrounding its theoretical basis, however, the cases in which the doctrine has been applied can be examined to gain a basic understanding of the doctrine and its application.

3. *Case Law Development of the Implied Reservation Doctrine*

Although the implied reservation doctrine was foreshadowed in the *Rio Grande* case, it was first explicitly articulated in *Winters v. United States*.[68] That case was brought to restrain the appellants from damming or diverting the Milk River, which flows into the Fort Belknap Indian Reservation in Montana. The reservation had been created in 1888, one year before Montana was admitted to the Union. The Court held that on the day that the reservation was established, the United States had impliedly reserved as much water as would be necessary for use by the Indians throughout the years. Thus, any private appropriative rights to the waters of the Milk River acquired under state law after that day would be inferior to rights concerning water use by the reservation. Appellants had argued that the United States Government was not exempt from state law and could not therefore reserve water for the reservation. The Court answered, however, that it was not the intent of Congress to allow the state

63. TRELEASE, *supra* note 5, at 114-15.

64. 174 U.S. 690 (1899).

65. *Id.* at 703. *See also* text accompanying note 25 *supra.*

66. *Federal-State Conflicts, supra* note 58, at 434.

67. *See* notes 37-48 and accompanying text *supra.*

68. 207 U.S. 564 (1908).

of Montana to destroy the reservation one year after its creation by withholding from it the water needed by its inhabitants.

While *Winters* shed little additional light on the basis of the doctrine,[69] the case did establish the power of the federal government, at least in the case of Indian reservations, to reserve by implication any water that may be necessary for their continued viability. In fact, this doctrine was considered for years to be uniquely applicable to Indian reservations.[70] It was not until later that the Court decided that the doctrine was applicable to other reserved federal lands.[71]

The power of the federal government, regardless of state law, to dam water in nonnavigable streams adjacent to federally reserved non-Indian land was first postulated by the Supreme Court in *Federal Power Commission v. Oregon*,[72] the "*Pelton Dam*" case. In an earlier case, *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*,[73] the Supreme Court had held that it was unnecessary for an applicant for a federal license to build a power project on a navigable stream to comply with state law. Section 9(b) of the Federal Power Act,[74] according to the Court, only requires the Federal Power Commission [FPC] to look to state law as one factor to consider in evaluating applications for licenses. If state law conflicts with the Power Act, the latter prevails.

The *Pelton Dam* case also dealt with the licensing powers of the FPC but, unlike *First Iowa*, *Pelton Dam* concerned a dam being built on a nonnavigable stream on reserved land of the United States. The State of Oregon challenged the authority of the Commission to issue the license and questioned the adequacy of provisions approved by the FPC for the protection of anadromous fish. The Court stated that, as in *First Iowa*, the FPC had jurisdiction to issue the license. But the Court added that in *Pelton Dam* the Commission's jurisdiction was based on "ownership or control by the United States of the reserved lands on which the licensed project is to be located,"[75] while in *First Iowa*, the Commission's jurisdiction was based on the United States' power over navigable waterways. In answer to Oregon's argument that the Acts of 1866 and 1870 and the Desert Land Act of 1877 were express delegations of power to the

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69. The *Winters* Court relied to a significant extent on language from *Rio Grande*, which, as discussed earlier in the text, is the seminal case upon which both supremacy clause and property clause theorists base their claims regarding the constitutional foundation for the implied reservation doctrine. *See generally* notes 49-67 and accompanying text *supra*. *See also* note 70 *infra*.

70. *Winters* can also be understood as a case dealing with the United States treaty power on the theory that in ceding their lands to the United States, the Indians impliedly reserved all water needed for their reservations.

71. Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955). *See* notes 72-85 and accompanying text *infra*.

72. *Id.*

73. 328 U.S. 152 (1946).

74. 16 U.S.C. § 802(B) (1976).

75. Federal Power Comm'n v. Oregon, 349 U.S. 435, 442 (1955).

states, the Court held that those acts referred only to "public lands" that could be sold to private citizens. The land in question, the Court continued, was a "reservation" to which the Acts were not applicable.[76] The Court also sought to avoid the duplication of regulatory control that would occur if the states were allowed to veto the license.[77] Thus, for the first time, by stressing the proprietary interests of the United States, the Court stated that the implied reservation doctrine applied to federal reserved land other than Indian reservations.

The first actual allocation of "reserved" water for non-Indian reservations came in *Arizona v. California*.[78] That case adjudicated the rights of five states in the Colorado Basin[79] to the waters of the navigable Colorado River. The United States intervened to protect its water rights in several types of reserved lands. The Court held that the Secretary of the Interior had been granted power by Congress[80] to distribute water from the Boulder Canyon Project and that the Secretary was not bound to follow state law.[81] The Court found this power to "regulate navigable waters" not only in the Commerce Clause,[82] but also in the Property Clause. Relying on *Winters*,[83] the Court reaffirmed the ability of the federal government to reserve water for an Indian reservation for which the United States was claiming reserved water rights.[84] It also extended the doctrine to other types of federal reservations, including the Gila National Forest, the federal reservation in question in *United States v. New Mexico*.[85]

## II. *United States v. New Mexico*

### A. *Facts*

The Rio Mimbres River, which was the center of controversy in the *New Mexico* litigation, originates in the highlands of the Gila National

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76. *Id.* at 448.

77. *Id.* at 445, *citing* First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152, 177-79 (1946).

78. 373 U.S. 546 (1963).

79. Arizona, California, Nevada, New Mexico, and Utah.

80. Boulder Canyon Project Act, 43 U.S.C. § 617 (1976). The project consisted of a series of federally-funded dams along the Colorado River in the states listed in note 79 *supra*.

81. 373 U.S. at 586.

82. U.S. CONST. art. I, § 8, cl. 3.

83. 373 U.S. at 597-98.

84. The Court stated that the quantity of water an Indian reservation could withdraw would be that amount which was enough so that the "practicably irrigatable" lands could be put to use. The Court did not stipulate a quantity for any other types of reserved lands. *Id.* at 598-600.

85.

> After *Arizona v. California* held that the Gila National Forest has reserved water rights, the Forest Service revised its Manual of Procedures which guides its field personnel. They are now instructed to regard all water uses by others on the forest as "permissive," to scrupulously avoid complying with state law when using water on reserved lands, though notifying state agencies, and to just as scrupulously adhere to state law or water uses on acquired lands.

TRELEASE, *supra* note 5, at 86-87, *citing* WHEATLEY & CORKER, STUDY OF THE DEVELOPMENT, MANAGEMENT AND USE OF WATER RESOURCES ON THE PUBLIC LANDS 203-11 (1969).

Forest and flows generally southward through the forest and past more than fifty miles of privately owned land. The river provides water for both irrigation and mining on these lands.

This suit was initiated in 1966 as a private action to enjoin allegedly illegal diversions of the river. In 1970 the State of New Mexico filed a complaint-in-intervention,[86] seeking a general stream adjudication to determine the exact rights of each user of the Mimbres and its tributaries. The complaint named as defendants all parties claiming any interest in and use of the waters of the Rio Mimbres, including the United States.[87]

The United States claimed reserved rights for minimum instream flows[88] and for recreational, stockwatering, and "fish" purposes within the Gila National Forest. The matter was referred to a special master by the trial court to determine the rights of the parties. The master found, *inter alia*,[89] that specified amounts of water were being used in the forest for stockwatering and that a minimum instream flow of 6.0 cubic feet per second was being used for "fish" purposes and recreation. The master's conclusions of law supported the United States' claim to this water. The State of New Mexico objected to the master's report.[90]

The New Mexico District Court held that the United States, in setting aside the Gila National Forest from other public lands, reserved the use of such water "as may be necessary for the purposes for which [the land was] withdrawn," but decided that these purposes did not include recreation, aesthetics, wildlife-preservation, or cattle grazing. The United States made an unsuccessful appeal to the Supreme Court of New Mexico,[91] and the United States Supreme Court granted certiorari to consider whether the

86. The motion was filed pursuant to N.M. STAT. ANN. § 72-4-15 (1978).

87. The United States was joined pursuant to the McCarran Amendment of 1970, 43 U.S.C. § 666 (1976). The amendment allows the United States to be sued in state courts when government-owned water rights are at issue. The purpose of the Act was to encourage judicial efficiency by consolidating all water rights adjudication into a single forum. For an excellent discussion of the possible effects of state-court adjudication of federal reserved water rights, *see* Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision*, 30 STAN. L. REV. 1111 (1978).

88. "Minimum instream flow" means maintaining a certain minimum amount of water flowing in the stream bed. Because the prior appropriation system of water law frequently requires an actual diversion for the appropriation to be perfected, as does New Mexico law, *see* State v. Miranda, 83 N.M. 443, 493 P.2d 409 (1972), it may be, at least for the present, impossible under New Mexico law for the state to appropriate water to guarantee minimum instream flows. The inability to appropriate water for minimum instream flows may, therefore, prevent state or federal agencies from maintaining streams for uses such as fish and wildlife preservation and recreation. Under New Mexico law, however, recreation is a beneficial use of water. *See* Game Comm'n v. Red River Valley Co., 51 N.M. 207, 218, 182 P.2d 421, 428 (1945). Thus, the maintenance of instreav flows for recreational uses may meet the beneficial use requirement of New Mexico appropriation law (N.M. CONST. art. 16, §§ 1, 2), though this is inconsistent with the diversion requirement. For a detailed discussion of these issues, *see* Note, *Appropriation By the State of Minimum Flows in New Mexico Streams*, 15 NAT. RESOURCES J. 809 (1975).

89. The Special Master also found that the United States was diverting 6.9 acre-feet per annum of water for domestic-residential use, 6.5 acre-feet for road use, 3.23 acre-feet for domestic-recreational use, and .10 of an acre-foot for "wildlife" purposes. 438 U.S. at 703.

90. The objection was made pursuant to N.M.R. CIV. P. 53(e)(2).

91. Mimbres Valley Irrigation Co. v. Salopek, 90 N.M. 410, 564 P.2d 615 (1977).

Supreme Court of New Mexico had properly applied principles of federal law.

B. *Analysis of the Court's Reasoning*

The Court did not perceive the issue to be whether Congress had the *power* to reserve water for the national forest—such power was clearly present. Instead, the issue was one of *intent*—how much water had Congress intended to reserve for the forest?

The question of "amount," however, was difficult because of the failure of Congress to state specifically the amount of water to be reserved for national forests. This silence, as the Court indicated, would be of little significance to a case which concerned an area where water was plentiful. Due to the aridity of the western states, however, and the vast land holdings of the federal government, the question of the amount of water the federal government may reserve becomes a very important one, not only for the federal government, but also for private water users and for the states where the reservations are located.[92]

This question is also crucial because of what the Court recognized as traditional deference of Congress to state water law.[93] Because the implied reservation doctrine is a departure from this traditional deference, the Court endeavored to use it sparingly. To this end, and because Congress had not specifically stated the amount of water to be reserved for a national forest, the Court carefully examined the purposes for which a national forest could be created.

The Court created a test for determining Congress' purpose, or "implied intent," in establishing a national forest. Under this test, it is first necessary to determine whether "it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water."[94] Only when the primary purpose of the land reservation would be entirely frustrated without the reservation of water will an intent to reserve water be implied,[95] and then only "that amount of water necessary to fulfill the purpose of the reservation, no more."[96] The Court went on to create a

92. The vast land holdings of the federal government in the western states were described in the following statement of the Court:

> The percentage of federally-owned land (*excluding* Indian reservations and other trust properties) in the Western States . . . average[s] . . . about 46% [in each state]. Of the land in the State of New Mexico, 33.6%is federally owned. . . . Because federal reservations are normally found in the uplands of the Western States rather than the flatlands, the percentage of water flow originating in or flowing through the reservations is even more impressive. More than 60% of the average annual water yield in the 11 Western States is from federal reservations. . . . In the Rio Grande water-resource region, where the Rio Mimbres lies, 77% of the average runoff originates on federal reservations.

438 U.S. at 699 n.3.

93. *Id.* at 702.

94. *Id.*

95. *Id.* at 700.

96. *Id., quoting* Cappaert v. United States, 426 U.S. 128, 141 (1976).

category of "secondary" uses of the national forest. When water is only valuable for such a secondary use, the United States would have to acquire it "in the same manner as any other public or private appropriator."[97] Thus, the Court has set up a bifurcated method for obtaining water rights on federally reserved lands, depending on whether the purpose is "primary" or "secondary."

In applying this test to the facts of the case, the Court affirmed the decision of the Supreme Court of New Mexico, holding that Congress had implicitly intended to reserve water necessary to fulfill the purposes for which the Gila National Forest was created. Those purposes, however, did not include recreation, aesthetics, wildlife-preservation, or cattle grazing, which the Court characterized as secondary rather than primary purposes.[98] Under the Organic Administration Act of 1897[99] the Court found two primary purposes for which a national forest can be created: to conserve water flows and to furnish a continuous supply of timber for the people.[100] That Act provides:

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, [the Creative Act of 1891[101]] to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.[102]

According to the Court, the United States has expressed an intent to appropriate water under the implied reservation doctrine only for the two primary purposes listed in the Organic Administration Act.

An alternative interpretation offered by the United States was that the Act stated three purposes for which a national forest could be created: the two purposes recognized by the Court, which are to furnish continuous supplies of timber and to conserve water flows, and a third, broader purpose, to protect the forest.[103] Under this interpretation, the United States contended that Congress intended "to reserve minimum instream flows for aesthetic, recreational, and fish-preservation purposes," and for stockwatering.[104]

Other sections of the Act itself tend to indicate a broader purpose than

97. 438 U.S. at 702.

98. *Id.* at 706-08.

99. Ch. 2, 30 Stat. 11 (current version at 16 U.S.C. §§ 473-78, 479-82, 551 (1976).

100. 438 U.S. at 707.

101. Creative Act of 1891, 16 U.S.C. § 471 (repealed 1976). The Act gave the President authority to reserve public lands as national forests.

102. Organic Administration Act of 1897, 16 U.S.C. § 475 (1976).

103. 438 U.S. at 707-08 n.14.

104. *Id.* at 705. Specifically, the United States contended that water could be reserved for the following forest purposes: (1) maintenance of an assured flow if two cubic feet per second at three separate points on the stream within the national forest for protection from fire and erosion and for the protection of an endangered species of trout; (2) for limited recreational use incidental to hunting,

the Court recognized. For example, one section authorized the Secretary of Agriculture to "make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."[105] The "occupancy and use" language appears to contemplate purposes other than the two recognized by the Supreme Court. The Act also authorized the entry onto the forest lands by anyone "for all proper and lawful purposes,"[106] which also supports the contention that water may be reserved for national forests for more than the two limited purposes set forth by the Court.

The Court rejected this interpretation, however, and held that the Organic Administration Act only enunciated two purposes for which national forests could be created.[107] The "improve and protect the forest" phrase of the Act,[108] relied on by the United States and the dissent in support of their argument for a third, broader purpose for national forests, was explained away by the Court by reading additional words into the statute, interpreting this phrase as being only an alternative way of saying "for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber."[109]

The Court justified this interpretation in several ways. First, it looked to the legislative history of the Act, including the congressional debate at the time the Act was passed and administrative regulations made near the time of its passage. Second, the Court compared the Act to other legislation dealing with federal reservations. Third, the Court justified this interpretation through its reading of the Multiple-Use Sustained-Yield Act of 1960.[110] Finally, the Court noted and relied on what it termed "traditional deference" to state water law.

### 1. *The Legislative History of the Organic Administration Act of 1897*

In order to fully understand the congressional debates on the Organic Administration Act, one must recognize the historical context in which the debates were held. At the urging of conservationists, the Creative Act of 1891[111] was enacted in the hope that it would halt damaging logging

camping, and hiking; and (3) for consumption by stock. Petitioner's Brief for Certiorari, United States v. New Mexico, 438 U.S. 696 (1978).

In reference to the first purpose it should be noted that the master termed the purpose as a "fish" purpose and refused to amend the language of his report to include the other intended purposes. The state courts also refused to allow such an amendment. *Id.* This is significant because a stated purpose of the United States for requesting the minimum instream flow was to protect the forest from fire and erosion, which were purposes contemplated by the Congress in enacting the Organic Administration Act. *See* note 94 and accompanying text *supra*.

105. 16 U.S.C. § 551 (1976).

106. 16 U.S.C. § 478 (1976).

107. *See* note 100 and accompanying text *supra*.

108. For the text of the Act, see text accompanying note 102 *supra*.

109. 438 U.S. at 707 n.14.

110. 16 U.S.C. §§ 528-31 (1976).

111. Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1103.

practices and be "used to save the best of the remaining public timberlands for controlled management,"[112] although the Act itself did not set out a specific purpose. The Act merely authorized the president to reserve public forest land without giving any specific guidelines.

In February 1897, in response to an unpublished report of the National Forest Commission urging strong conservation measures, President Cleveland arbitrarily established forest reserves in seven states totalling approximately twenty-one million acres of forest land. Much of this land had been settled and was being used as homesteads and for mining and lumbering. Because it was generally believed that this reservation prohibited all domestic and commercial use of these lands, the storm of protest that arose was swift and angry.[113] This protest significantly influenced the debate on the Organic Administration Act. Although many of the comments of the supporters of the bill were aimed at reassuring western Congressmen that the forests were not to be set aside for nonuse, as those Congressmen thought President Cleveland had done, these same supporters also had conservation motives.

The *New Mexico* Court relied heavily on these reassuring statements by the bill's sponsors in support of its theory that the Organic Administration Act provided only a twofold purpose for the creation of national forests. In particular, the Court relied on the statements of Congressman McRae, one of the bill's sponsors and a sponsor of similar earlier legislation: "The purpose, therefore, of this bill is to maintain favorable forest conditions, without excluding the use of these reservations for other purposes. They are not parks set aside for nonuse, but have been established for economic reasons."[114]

There were, however, other comments by supporters of the bill that tend to support the contrary position—that the Act does have broader purposes. For example, in the paragraph immediately following the one cited by the Court, Congressman McRae stated that the Act was necessary to "prescribe the manner and method by which the timber growing thereon, the mineral contained therein, the water power furnished by them and the *pasturage* within the same shall be used, so as not to injure or destroy the primary objects for which they [the forests] were established."[115] Additionally, another supporter of the bill, Congressman Lacey, who was an "Easterner," suggested that one purpose of the bill was to

> prevent the people of the West from doing as foolish things as the people of the East once did and which they now regret. The people of the East destroyed the salmon in the Connecticutt River, just as to-day the salmon are being destroyed in the Columbia River.
>
> The people of the East destroyed the timber of the Adirondacks, just as

112. P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 566 (1968) (citation omitted).

113. *Id.* at 568-69.

114. 438 U.S. at 708.

115. 30 CONG. REC. 966 (1897) (emphasis added).

> to-day the timber is being destroyed in Montana and other places in the West.[116]

Thus, arguments can be made supporting either interpretation of the Act. It is apparent from the congressional debates that the major preoccupation of western congressmen was ensuring that the Act did not result in setting aside the forests for complete nonuse, as they believed the presidential proclamation had done. Supporters of the bill, who were concerned about passing an act to control timbercutting for purposes of conserving the forests and for flood control, were preoccupied with reassuring the skeptics that the Act would not have the same effect as Cleveland's proclamation. Therefore, any argument concerning the purpose of the Act based on a reading of the record of these debates is at best a makeweight.

The dissent also found this argument unpersuasive. The issue of the purposes for which the forests were created was the sole point of disagreement between the dissent and majority opinions. Citing the "improve and protect the forest" language of the Act, the dissent found it hard to believe that Congress intended the forests to be

> the still, silent, lifeless places envisioned by the Court. In my view, the forests consist of the birds, animals, and fish—the wildlife—that inhabit them. . . . I therefore would hold that the United States is entitled to so much water as is necessary to sustain the wildlife of the forests, as well as the plants.[117]

Although the dissent noted that normally the water flow necessary to maintain the watershed would be sufficient to protect the wildlife, the opinion expressed concern that in exceptional situations the United States would be powerless to reserve additional water for this purpose. The dissent was concerned, for example, that an upstream appropriator could divert so much water that the forest wildlife, including life in the streams, would be endangered.[118] Seeing the wildlife as part of the forest that was to be "preserved," the dissent felt the United States had intended to reserve water for such purposes if necessary.

Additionally, the Court made reference to administrative regulations as confirming these two limited purposes for which national forests may be established. The Court cited a 1913 report of the Chief Forester as support for this proposition.[119] Other regulations, however, illustrate that forest administrators felt that forests were established for broader purposes. A 1902 Forest Reserve Manual, for example, stated that "all law abiding people are permitted to travel in forest reserves for the purpose of

116. *Id.* at 981.
117. 438 U.S. at 719.
118. *Id.* at 724 n.5.
119. *Id.* at 709 n.16.

prospecting, surveying, to go to and from their own lands or claims, and for pleasure and recreation."[120]

Therefore, in light of the varying conclusions that can be drawn from the legislative and administrative history that the Court cited in support of its interpretation of the Organic Administration Act, reliance on these sources is dissatisfying and unpersuasive.

*2. Other Legislation Regulating Federally Reserved Lands*

The Court emphasized what it believed to be the narrow purposes for which national forests are to be reserved, by contrasting the language of the Organic Administration Act with the "broader" language of legislation establishing and regulating other federal reservations.[121]

First, the Court discussed the statute authorizing the establishment of national parks, which specifically states that its purpose "is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same . . . unimpaired for the enjoyment of future generations."[122] It next discussed an act specifically providing for fixed water levels in the streams and lakes of the Superior National Forest.[123] The Court also discussed legislation specifically authorizing the establishment, with the consent of the appropriate state legislature, of fish and game sanctuaries within national forests.[124] Finally, the Court noted that in establishing Yosemite National Park in 1890,[125] Congress explicitly instructed the Secretary of the Interior to provide for the protection of fish and game. So, the Court reasoned, if Congress had intended national forests in general to be established for these types of uses it would have specifically provided such in the Organic Administration Act as it did in the other acts.[126] In addition, the Court held that if Congress had meant the national forests to be used as fish and game sanctuaries (or for other similar purposes), with the resulting authority to reserve water under the implied reservation doctrine to maintain instream flows, it would not have been necessary to adopt legislation establishing fish and game sanctuaries in national forests and fixed water levels in Superior National Forest.[127] In its analysis of this legislation, however, the Court assumed that Congress carefully evaluated the Organic Act and, on the basis of that evaluation, found it necessary to enact specific legislation due to the limited purposes

120. GENERAL LAND OFFICE, U.S. DEP'T OF THE INTERIOR, FOREST RESERVE MANUAL FOR FOREST OFFICERS 8 (1902).

121. *See* 438 U.S. at 708-11.

122. National Park Service Act of 1916, ch. 408, 39 Stat. 535 (codified in scattered sections of 16 U.S.C.).

123. Act of July 10, 1930, 16 U.S.C. § 577b (1976).

124. Act of March 10, 1934, ch. 54, 48 Stat. 400.

125. Act of October 1, 1890, ch. 1263, 26 Stat. 650.

126. 438 U.S. at 709-11.

127 *Id.*

for which a forest could be created under the Organic Act. This assumption is erroneous.

In fact, it appears that Congress *has* assumed that the Organic Administration Act provides for more than the two narrow purposes that the Court suggested. Apparently, Congress has assumed that national forests can be used for a variety of purposes and has enacted legislation to appropriate funds for and to regulate the use of forest resources in a number of ways. For example, Congress has repeatedly authorized expenditures for the protection of fish and game in the national forests,[128] authorized expenditures of money for range improvement,[129] provided for the regulation of grazing on national forest land,[130] authorized the use and occupation of forest land for hotels, resorts, summer homes, and other commercial facilities,[131] and authorized expenditures for research to promote the production, protection, and use of forest resources, including the improvement of rangeland, the improvement of food and habitat of wildlife, and management of the forest lands for outdoor recreation.[132] It appears from these acts, then, that Congress has assumed that national forests can be used for a wide range of purposes—purposes that, according to the Court's holding, Congress did not intend to be supported by reserving water under the implied reservation doctrine because they are at best "secondary" purposes. Whether water may be reserved for these secondary purposes is problematic. The question is not answered, however, by the Court's reliance on the legislation previously discussed. Such legislation is no more persuasive than that cited in support of a broader interpretation of the Organic Act. Again, the Court's reliance on these statutes seems to be little more than a makeweight and is unpersuasive.

### 3. *The Multiple-Use Sustained-Yield Act*

The *New Mexico* Court also examined the Multiple-Use Sustained-Yield Act of 1960,[133] which provides:

> It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of [this Act] are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 [the Organic Administration Act] of this title.[134]

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128. Sundry Civil Appropriations Act, 30 Stat. 1095 (1899); 33 Stat. 872 (1905); 34 Stat. 683 (1906); 34 Stat. 1269 (1907).

129. Act of April 24, 1950, 16 U.S.C. § 580h (1976).

130. 16 U.S.C. § 580*l* (1976).

131. Act of July 28, 1956, 16 U.S.C. § 497 (1976).

132. Act of October 10, 1962, Pub. L. No. 87-788, 76 Stat. 806.

133. 16 U.S.C. §§ 528-31 (1976).

134. 16 U.S.C. § 528 (1976).

After its analysis of the Multiple-Use Act, the Court agreed with the Supreme Court of New Mexico and concluded that although the Act was "intended to broaden the purposes for which national forests had previously been administered, . . . Congress did not intend to thereby expand the reserved rights of the United States."[135] Thus, even though the Court conceded that the Multiple-Use Act expanded the purposes for which forests could be administered, due to the traditional deference by Congress to state water law, the purposes in the Act were only *secondary* purposes. The two purposes that the Court found in the Organic Administration Act, namely to conserve water flows and to furnish a continuous supply of timber, are *primary* purposes,[136] one of which *must* be present for the reservation of water for a national forest to be valid.[137] These "secondary" purposes enumerated in the Multiple-Use Act are purely supplemental to and may not derogate from the attainment of the two primary purposes.[138]

The United States did not argue that the Multiple-Use Act broadened the purposes for which a national forest could be established. Instead, it contended that the Act recognized purposes that had always existed, pursuant to its broad reading of the Organic Administration Act.[139] This interpretation is supported by the legislative history of the Multiple-Use Act. In the House Report on the Act it was noted that:

> Through the years by a number of congressional enactments, including appropriations for carrying out specific activities and functions, through court decisions, and through policy directives and statements, the management of the national forests under the principle of multiple use has been thoroughly recognized and accepted. The application of the principle of sustained-yield management has also been thoroughly established. It is thus desirable that the Secretary of Agriculture have a directive to administer the national forests under the dual principles of multiple use and sustained yield.[140]

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135. 438 U.S. at 713 (citation omitted).

136. *See* note 100 and accompanying text *supra*.

137. 438 U.S. at 714-15.

138. *Id.* at 714. This language was taken by the Court from the House Report accompanying the Multiple-Use Sustained-Yield Act which was worded as follows:

> [Congress wanted to] make it clear that the declaration of congressional policy that the national forests are established and shall be administered for the purposes enumerated is supplemental to, but is not in derogation of, the purposes of improving and protecting the forest or for securing favorable conditions of water flows and to furnish a continuous supply of timber as set out in the cited provision of the Act of June 4, 1897. Thus in any establishment of a national forest a purpose set out in the 1897 Act must be present but there may also exist one or more of the additional purposes listed in the bill.

H.R. REP. No. 1551, 86th Cong., 2d Sess., *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 2377, 2380. Thus, the interpretation of the Multiple-Use Sustained-Yield Act depends to a large degree on what interpretation is given to the Organic Administration Act of 1897—which the Court has narrowly interpreted to embody only the two purposes of conserving water flows and furnishing continuous supplies of timber.

139. For a further discussion of this argument, *see* note 104 and accompanying text *supra*.

140. H.R. REP. No. 1551, 86th Cong., 2d Sess., *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 2377, 2378.

The quantity of legislation that Congress has enacted to appropriate funds for and regulate the various uses of the forests enumerated in the Multiple-Use Act also supports this construction of the Act.[141]

If the Court had accepted this interpretation, the federal government could have appropriated enough water to fulfill these various purposes under the implied reservation doctrine. Instead, according to the Court, Congress intended to reserve water under the reservation doctrine, only for the purposes of furnishing continuous supplies of timber and conserving water flows, but for none of the other purposes enumerated in the Multiple-Use Act. This is an odd result since Congress, in the Multiple-Use Act, specifically recognized these additional purposes for which national forests can be established.

This result is even stranger in light of language in the House Report which declared that none of the uses enumerated had priority over any other forest use:

> One of the basic concepts of multiple use is that all of these resources in general are entitled to equal consideration, but in particular or localized areas relative values of the various resources will be recognized. The order in which resources are listed in the bill is not to be construed as indicating any priority of one of the resources over another. The listing is merely alphabetical. . . . In one locality timber use might dominate; in another locality use of the range by domestic livestock; in another outdoor recreation or wildlife might dominate. . . . But no resource would be given a statutory priority over the others.[142]

It seems inconsistent that Congress would recognize such additional purposes without intending to appropriate water for these purposes in the same manner that it provides water for purposes previously recognized in the Organic Administration Act. This, however, is the result under the Court's interpretation. Thus, in the future, when the federal government needs water for a national forest for purposes other than furnishing continuous supplies of timber and conserving water flows, it will be required to obtain it in the same way that any other water user would do so under state law or through eminent domain.

The Multiple-Use Act can also be interpreted as broadening the purposes for which national forests may be administered after 1960. Under this view, water rights would vest under the implied reservation doctrine at the time Congress expanded the purposes for which national forests may be used—in the case of the Multiple-Use Act, 1960.[143] The federal government's water rights for these purposes would be subject only to previously-vested water rights in other users.

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141. *See* notes 124-30 and accompanying text *supra*.

142. H.R. REP. No. 1551, 86th Cong., 2d. Sess., *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 2377, 2379.

143. For a general discussion of this interpretation of the Multiple-Use Sustained-Yield Act, see Abrams, *supra* note 87, at 1135-39.

In dicta the Court recognized this argument[144] but adhered to its previous stand that Congress only intended that national forests be created for the two purposes that the Court recognized in the Organic Administration Act. The Court stated that in the Multiple-Use Act, Congress intended only to *expand* the purposes for which national forests could be *administered.* The Court failed, however, to give a definitive answer to the question whether the United States had water rights under the implied reservation doctrine for these "expanded" purposes. Instead, the Court said only that even if the United States had such water rights, they would be subordinate to any vested rights obtained under state law prior to 1960.[145] Although the United States did not raise this argument, it appears that the Court did recognize it and would have applied this theory to the facts of *New Mexico* had it considered the argument valid. Apparently the Court did not so consider it.

The *New Mexico* decision leaves unanswered the question whether the Multiple-Use Act authorized a broader application of the doctrine of reserved water rights for national forests created after 1960.[146] It would be inconsistent, however, for the Act to authorize broader reserved water rights for forests created after 1960 but not for forests existing before that date. Congress does have the power to expand the purposes for which a forest may be used. As the Court stated, the issue is one of intent. It is possible, of course, that Congress intended to create this broader water right for forests created after 1960. But this intent is not apparent from the language of the Act or the legislative history which emphasizes past, present, and future uses of national forests.[147] It would seem, therefore, that the Court in the future will insist that Congress did not mean to expand water rights under the reservation doctrine, even for national forests created after enactment of the Multiple-Use Act.

### 4. *Deference to State Law*

Throughout the majority opinion the Court emphasized the traditional deference of Congress to state water law. The implied reservation doctrine, the Court said, was built on the inference that Congress intended to reserve water to carry out the purposes for which public land was reserved. Therefore, the doctrine had to be narrowly construed as an exception to Congress' otherwise explicit deference to state water law.[148]

Although it is true, as the Court stated, that many congressional enactments defer to state law, especially state water law, it is not necessarily true that the Court's interpretation of these laws has been

144. 438 U.S. at 713-14 n.21.

145. *Id.*

146. *Id.* at 715 n.22.

147. For this language *see* text accompanying notes 134, 140, 142 *supra.*

148. 438 U.S. at 715.

especially deferential to state law. The Court first noted that courts traditionally have carefully examined the specific purposes for which the land had been reserved and then questioned whether these purposes would be entirely defeated without the reserved water.[149] In light of this assertion by the Court, it is enlightening to examine the Court's reasoning on this issue in previous cases dealing with the implied reservation doctrine.

*Federal Power Commission v. Oregon*[150] was the first case in which the Court applied the implied reservation doctrine to federal reservation other than Indian reservations. That case held that the FPC could issue licenses for a power project located on a federal reservation even though the project would not qualify for licensing under state law. The decision emphasized that under the facts of the case, Oregon law would have "vetoed" the federal project. A veto of this particular project could be termed a defeat of the purpose of the reservation, which was used as a power site. The Court failed, however, to discuss whether a compromise could have been reached that would have accomodated at least some of the goals of state law without halting the construction of the power project and thereby defeating the purpose of the reservation. Instead, the Court insisted that authorization of the project was within the exclusive jurisdiction of the FPC.[151] Thus, although the facts of the case conform to the Court's requirement that the federal purpose be "defeated" before state law is disregarded, it is not clear that the Court at the time would only have disregarded state law to avoid frustrating such a federal purpose.

The Court next addressed this issue in *Arizona v. California*,[152] which involved a complex adjudication of water rights of the Colorado River under the Boulder Canyon Project Act. The Court held that under the Act the Secretary of the Interior not only had the authority to divide up water among the five states in the case and the United States, but that he could also allocate water among users in each state *regardless* of state law. The Court relied on language in the cases of *Ivanhoe Irrigation District v. McCracken*[153] and approved in *City of Fresno v. California*.[154]

In *Ivanhoe*, the Court held that where the federal government had placed a 160-acre limit on the amount of land irrigable by one of its irrigation projects, section 8 of the Reclamation Act[155] did not compel the

149. *Id.* at 702.

150. 349 U.S. 435 (1955). *See* notes 72-77 and accompanying text *supra*.

151. 349 U.S. at 444-45.

152. 373 U.S. 546 (1963). *See* text accompanying note 78 *supra*.

153. 357 U.S. 275 (1958).

154. 372 U.S. 627 (1963).

155. Ch. 1093, 32 Stat. 390 (1902) (codified in scattered sections of 43 U.S.C.). The relevant language of the Act is as follows:

§ 372: The right to the use of water acquired under the provisions of . . . [§ 383] of this [title] shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

§ 383: Nothing in . . . [§ 372] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation,

United States to comply with a state law requiring the government to supply water to a person owning 640 acres. In dicta the Court read section 8 as requiring the United States to comply with state law only when it was necessary to acquire vested water rights.[156] Under section 8, the Court found that the federal government may "impose reasonable conditions relevant to federal interest in the project and to the overall objectives thereof."[157]

Similarly, in *City of Fresno*, the Court dismissed a suit against the United States for lack of consent to be sued. In the suit the city had sought an injunction against a reclamation project and a declaration that under various California laws the municipality had statutory priority to water involved in the project.[158] In dicta the Court stated that the effect of section 8 of the Reclamation Act was not to allow state law to prevent the United States from exercising its power of eminent domain. Instead, section 8 merely left to state law "the definition of the property interests, if any, for which compensation must be made."[159] Thus, *Arizona v. California* and two of the cases it relied on did not illustrate any traditional deference to state water law, at least in the dicta.

The present Court attempted to rectify this treatment of state water law in *California v. United States*,[160] decided on the same day as *United States v. New Mexico*. *California* also concerned a federal water reclamation project under the Reclamation Act. The Court undertook a detailed narration of the history of the Act to illustrate that the Act reflected an attitude of cooperative federalism.[161] It disavowed the dicta in *Ivanhoe* and *City of Fresno* discussed above, stating that in *Arizona v. California* there was no need for the Court to reaffirm this dicta, and held that state law can impose conditions on permits granted to the United States as long as the conditions are not inconsistent with congressional provisions authorizing the project.[162] The Court went on to say that section 8 cannot be read to require the Secretary of the Interior to comply with state law only when it becomes necessary to purchase or condemn vested water rights.[163] Thus, the Court was attempting to apply retroactively a principle of traditional deference to state law.

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use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or waters thereof.

156. 357 U.S. at 291.

157. *Id.* at 295.

158. 372 U.S. at 628.

159. *Id.* at 630.

160. 438 U.S. 645 (1978). Justice Rehnquist wrote the majority opinions in both California v. United States and United States v. New Mexico.

161. *California*, 438 U.S. at 650.

162. *Id.* at 673-74.

163. *Id.* at 674.

In light of the recent decisions in both *California* and *New Mexico*, the Court is apparently tightening up its interpretation of allowable federal control over state water law both as to the implied reservation doctrine and specific statutory delegations of power to the federal government, such as the Reclamation Act.

*Arizona v. California* raises an additional issue that the Court did not directly address. In that case, both the State of New Mexico and the United States were parties to the action. A master was appointed to make findings of fact and law, which the Court specifically adopted.[164]

The master concluded that water for the Gila National Forest, as well as for ten other forests, was to be reserved for the following purposes: (1) protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for animals; (4) protection and propagation of wildlife; and (5) recreation for the general public.[165] Although *Arizona* concerned an adjudication of the rights to use water from the Gila and San Francisco Rivers, which run through the Gila National Forest, and not the Rio Mimbres, the river in *New Mexico*, this difference would not affect the purposes for which the forest could be used, as found by the special master. Thus, under the doctrine of collateral estoppel[166] the United States and New Mexico were bound by this earlier adjudication and the issue of the purposes for which the Gila National Forest may be used could not be relitigated, as it was in *New Mexico*.[167] That the Court chose not to deal with this issue may also be indicative of the Court's eagerness to set forth the uses for which the federal government could obtain water rights under the implied reservation doctrine, thereby guaranteeing a larger role for states in determining water rights.

## III. CONCLUSION

According to the Supreme Court in *United States v. New Mexico*, Congress intended to reserve water by implication for national forests only if this water were to be used to conserve water flows and to furnish a continuous supply of timber. Water for other legitimate purposes, such as recreation, wildlife conservation, and cattle grazing, must now be obtained

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164. 373 U.S. at 601.

165. Report of Special Master at 96 (December 5, 1960), *as cited in* Arizona v. California, 373 U.S. 546 (1963).

166. The RESTATEMENT OF JUDGMENTS provides: "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action. . . ." RESTATEMENT OF JUDGMENTS § 68 (1942). Under FED. R. CIV. P. 52(a), the findings of a master, to the extent the court adopts them, are considered to be findings by the court.

167. *See* 438 U.S. at 700-01 n.4 for the Court's only reference to the master's report. The Court discussed only the part of the master's report which dealt with Indian reservations and did not discuss the fact that the special master had made findings as to the purpose for which the Gila National Forest may be used.

via state water law or through the purchase or condemnation of other users' water rights and not through the inherent rights of the United States as owner of the federal reservation. In finding such limited purposes for which water can be obtained under the doctrine, the Court has ignored well-established uses of the forests that were definitely contemplated when the forests were established. The Court has thereby frozen the uses that can be made of water in the forests.

The Court's purpose, although thinly disguised as a statutory interpretation, was in actuality to decide the case in favor of state's rights,[168] even at the cost of wooden readings of statutes, legislative history, and case law precedents. One may also question the validity of analyzing an eighty-year-old act[169] to determine the congressional purpose for reserving public land for national forests, especially in light of the fact that Congress has clarified such purposes as recently as 1960.[170]

Congress, of course, could relieve the problem by enacting legislation setting up a procedure to quantify future water needs on federal reservations. Such a quantification would enable states and private users to plan for future water use along with the federal government and give them some security with respect to availability of water for future needs.[171] In enacting such legislation, Congress could consider the possibility of compensating water users who had no vested right to the use of water under the implied reservation doctrine,[172] and whose water is appropriated for a federal reservation. These types of provisions would lessen the impact of the implied reservation doctrine on states and private users.[173] Based on Congress' demonstrated inability to pass this type of legislation, however, it is unlikely that such legislation will be enacted.[174]

Under the Court's analysis of relevant legislation, any water needed for uses other than the two narrow purposes recognized by the Court would have to be obtained under state law. This could be disastrous for such purposes as recreation, fish, and wildlife conservation, as under state

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168. *See* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976). The article analyzes Justice Rehnquist's "ideological commitments," which include, according to the author, a commitment to resolve conflicts between state and federal authority in favor of the state.

169. Organic Administration Act of 1897, 16 U.S.C. § 475 (1976).

170. Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528 (1976).

171. *Federal-State Conflicts, supra* note 58, at 510-11.

172. *See* text accompanying note 39 *supra.*

173. According to one commentator, however, as of 1976 there had been only one case involving a challenge by a private user whose use was impaired under the implied reservation doctrine. Note, *New Mexico's National Forests and the Implied Reservation Doctrine*, 16 NAT. RESOURCES J. 975, 987 (1976). This implies that the problem of conflicts between the states and private users on the one hand and the federal government on the other, is probably greatly exaggerated. For planning purposes, however, quantification of probable federal uses would, of course, be invaluable to both state and private water users.

174. Professor Morreale has examined the numerous futile attempts Congress has made at enacting such legislation. *See Federal-State Conflicts, supra* note 58.

appropriative water laws these uses are not preferred uses.[175] Thus, the *New Mexico* decision may signal trouble for national forests in implementing their multiple-use programs.

*Susan Hoffman Adams*

175. UNITED STATES PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 142 (1970) For the probable result of the Court's interpretation of *New Mexico* under New Mexico law, *see* note 88 *supra*.